

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

**Le v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs [2022] FedCFamC2G 966**

File number: MLG 99 of 2018

Judgment of: **JUDGE LADHAMS**

Date of judgment: 21 November 2022

Catchwords: **MIGRATION** – application for judicial review of decision of Administrative Appeals Tribunal affirming decision not to grant applicant Partner (Temporary) (Class UK) visa – whether Tribunal failed to comply with obligations under ss 359AA and 359A of the *Migration Act 1958* (Cth) – whether Tribunal wrongly fettered its approach to assessing whether there were ‘compelling circumstances’ for the purposes of cl 820.211(2)(d) in Schedule 2 to the *Migration Regulations 1994* (Cth) – whether Tribunal breached s 360 of the *Migration Act 1958* (Cth) – no jurisdictional error – application dismissed

Legislation: *Migration Act 1958* (Cth), ss 360, 359AA, 359A, 424A, 476, 477
Migration Regulations 1994 (Cth), Sch 2 cl 820.211, Sch 3 criterion 3001

Cases cited: *Malhi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1080
MZYPZ v Minister for Immigration and Citizenship (2012) 127 ALD 510; [2012] FCA 478
Qin v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 490
Singh v Minister for Immigration and Border Protection and Anor (2017) 325 FLR 275; [2017] FCCA 2461
SZBYR v Minister for Immigration and Citizenship (2007) 96 ALD 1; [2007] HCA 26
SZGIY v Minister for Immigration and Citizenship [2008] FCAFC 68
SZHKA v Minister for Immigration and Citizenship (2008) 172 FCR 1; [2008] FCAFC 138
SZJUB v Minister for Immigration and Citizenship [2007] FCA 1486

VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 236 FCR 549; [2004] FCAFC 123

Division:	Division 2 General Federal Law
Number of paragraphs:	69
Date of hearing:	2 June 2022
Place:	Perth
Counsel for the Applicant:	Ms G Costello KC
Solicitor for the Applicant:	FCG Legal Pty Ltd
Counsel for the First Respondent:	Mr T Reilly
Second Respondent:	Submitting appearance, save as to costs
Solicitor for the Respondents:	Mills Oakley Lawyers

ORDERS

MLG 99 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **TUYET THANH LE**
 Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT**
 SERVICES AND MULTICULTURAL AFFAIRS
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE LADHAMS

DATE OF ORDER: 21 NOVEMBER 2022

THE COURT ORDERS THAT:

1. The name of the first respondent is changed to ‘Minister for Immigration, Citizenship and Multicultural Affairs’.
2. The application is dismissed.

Note: The form of the order is subject to the entry in the Court’s records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE LADHAMS:

INTRODUCTION

- 1 The applicant seeks judicial review, pursuant to s 476 of the *Migration Act 1958* (Cth) (Migration Act), of a decision made by the Administrative Appeals Tribunal (Tribunal) on 24 April 2017. The Tribunal affirmed an earlier decision made by a delegate of the Minister not to grant the applicant a Partner (Temporary) (Class UK) visa (partner visa).
- 2 There are three main issues raised by the applicant's grounds. The issues raised by grounds 1 and 3 arise from the same factual circumstances. An issue before the Tribunal in assessing the applicant's partner visa application was whether there were compelling reasons to not apply the criteria in Schedule 3 to the *Migration Regulations 1994* (Cth) (Regulations). After the hearing, the Tribunal obtained a copy of the sponsor's movements record and relied in part on information in that record to find that there were not compelling reasons not to apply the Schedule 3 criteria. Ground 1 alleges that the Tribunal failed to follow the procedures set out in ss 359A or 359AA of the Migration Act to invite the applicant to comment on the information in the sponsor's movements record. Ground 3 alleges that the Tribunal failed to comply with s 360 of the Migration Act by not inviting the applicant to address at the hearing an issue in the proceeding arising from the sponsor's movements records. Ground 2 raises a separate issue, namely, whether the Tribunal incorrectly proceeded on the basis that the genuineness of the relationship between an applicant and sponsor cannot of itself amount to a compelling reason to waive the Schedule 3 criteria.
- 3 For the reasons explained below, I have found that the applicant has not established that the Tribunal decision is vitiated by jurisdictional error. I therefore dismiss the judicial review application.

BACKGROUND

- 4 The applicant is a non-citizen who arrived in Australia in March 2015 on a visitor visa which expired in June 2015. She applied for a partner visa on 18 November 2015 on the basis of her relationship with the sponsor, Mr Dao (sponsor). The applicant and the sponsor were married on 25 September 2015.

5 On 19 September 2016 a delegate of the Minister refused to grant the applicant a partner visa. Relevantly, the delegate found that the applicant did not satisfy cl 820.211(2)(d) in Schedule 2 to the Regulations. This was because the applicant did not make a valid application for the partner visa within 28 days of when she last held a substantive visa and therefore did not satisfy criterion 3001 and the delegate was not satisfied that there were compelling reasons for not applying the Schedule 3 criteria.

6 On 5 October 2016 the applicant lodged an application to the Tribunal for review of the delegate's decision.

7 The Tribunal convened a hearing on 21 April 2017, at which the applicant presented arguments and gave evidence.

8 On 24 April 2017 the Tribunal affirmed the decision under review.

TRIBUNAL DECISION

9 In circumstances where the applicant was not a holder of a substantive visa at the time of her application, the Tribunal identified that the issue for its determination was whether the applicant satisfied the criteria in Schedule 3 to the Regulations, or whether there were compelling reasons for not applying those criteria.

10 The Tribunal found the applicant did not meet criterion 3001, as her application for the partner visa was not lodged within 28 days of the 'relevant day', being the day on which she last held a substantive visa.

11 The Tribunal then considered for the purposes of cl 820.211(2)(d)(ii) whether there were compelling reasons for not applying the Schedule 3 criteria.

12 The Tribunal noted the evidence that the applicant and sponsor met in Vietnam in June 2012 and that they lived together in a spousal relationship from that time. The Tribunal was not satisfied that the claimed genuine relationship was a sufficient reason not to apply the Schedule 3 criteria.

13 The Tribunal considered movements records of the applicant and the sponsor to ascertain when they were both in Australia or both overseas. The Tribunal considered that there was no reliable documentary evidence of the applicant and the sponsor living together in Vietnam. The Tribunal acknowledged evidence that the sponsor's landlord claimed to have met the applicant when she was staying with the sponsor in his room at a rooming house, but noted

that the applicant went to live with her relatives when the sponsor returned to Vietnam. The Tribunal was not satisfied that the applicant and the sponsor had provided sufficient reliable evidence that they were in a long-standing relationship of two years duration or more. The Tribunal was not satisfied that the length of the relationship was a compelling reason not to apply the Schedule 3 criteria.

- 14 The Tribunal accepted that the applicant had a medical condition from an early age and accepted that she slipped and hurt her knee requiring surgery, time in hospital and rehabilitation. The Tribunal noted, however, that there was no medical evidence that she needed to be with the sponsor at the time she underwent surgery, or that she needed the sponsor as a result of the surgery or during any part of the ongoing medical treatment. The Tribunal also noted that the sponsor was overseas at the time of the applicant's accident and surgery, the applicant undertook two trips to Vietnam since her surgery, and the applicant stated her belief that she passed a medical examination in relation to an alternative application for a dependent relative visa, which she had since withdrawn.
- 15 The Tribunal accepted that the applicant may have relied on the sponsor for emotional support, especially at the time of her accident. However, the Tribunal found that the applicant's need to rely on the sponsor for support was not so compelling as to provide a basis for waiving the Schedule 3 criteria in circumstances where the sponsor was overseas from February to August 2015.
- 16 Having considered the evidence singularly and cumulatively, the Tribunal was not satisfied that there were compelling reasons for not applying the Schedule 3 criteria. The Tribunal therefore concluded that the applicant did not meet cl 820.211(2)(d)(ii) and affirmed the delegate's decision.

PROCEEDINGS BEFORE THIS COURT

- 17 The applicant commenced proceedings in this Court by way of an application filed on 15 January 2018. This application was filed outside of the 35 day timeframe prescribed by s 477(1) of the Migration Act, and the applicant requested in writing an order extending the time for her to file her application. On 17 October 2018 a Registrar of this Court made an Order by consent extending the time for the applicant to file her application.
- 18 By an amended application filed on 17 March 2022, the applicant advances the following three grounds of application:

1. The Tribunal failed to comply with its obligations under s.359A and s.359AA of the *Migration Act 1958* (Cth) when it:
 - a. failed to give to the applicant clear particulars of information that the Tribunal considered would be a reason or part of the reason for affirming the decision under review;
 - b. did not ensure that the applicant understood why the information was relevant to the review and the consequences of the information being relied on in affirming the decision under review; and
 - c. did not invite the applicant to comment on or respond to the information or advise the applicant that she could seek additional time to comment on or respond to the information.

Particulars

The information was the international movement records of the applicant and her sponsoring husband.

2. Then Tribunal wrongly fettered its approach to “compelling circumstances” to construe the provision as the mere existence of a genuine relationship could not of itself be a compelling reason not to apply the Schedule 3 requirements and thereby allowed policy guidance to unduly fetter the Tribunal’s approach to regulation 820.211(2)(d)(ii).
3. The Tribunal breached s 360 of the Migration Act because instead of inviting the applicant to a hearing to give evidence and present arguments relating to the issues arising in relation to the decision under review, the Tribunal obtained evidence after the hearing - in the form of the husband’s movement records - and used those records to conclude there were not compelling reasons not to apply the schedule 3 requirements without giving the applicant a chance to be heard about the evidence of the husband’s travel and their time apart in 2015.

19 The applicant filed written submissions on 12 May 2022 and the Minister filed written submissions on 25 May 2022. The matter came before me for hearing on 2 June 2022.

GROUND 1

Applicant’s submissions

20 The applicant submitted that the Tribunal failed to comply with its obligations under ss 359A and 359AA of the Migration Act in relation to the international movements records of the applicant and the sponsor. The applicant submitted that the information was adverse in its own terms in that it undermined the applicant’s relationship claims. The applicant also submitted that the movements record of the sponsor was obtained and assessed after the Tribunal hearing, which is evident from the date of the document and reinforced by the fact that the Tribunal questioned the applicant regarding her movements record, but not the sponsor’s movements record.

21 The applicant submitted that the movements records were relevant to the length of the relationship and her claim that the sponsor provided her emotional support. The applicant also submitted that had the sponsor's movements record been put to her, she could have pointed out that the sponsor arrived in Australia in August 2015 shortly after her accident and stayed until November 2015, following which the applicant joined the sponsor in Vietnam in December 2015.

22 In reply submissions, Counsel for the applicant submitted that the date of the sponsor's absence from Australia in the present case was adverse information, not neutral information, in an attempt to distinguish *SZGIY v Minister for Immigration and Citizenship* [2008] FCAFC 68 (*SZGIY*), a case referred to by the Minister (see below). Counsel for the applicant also submitted that there is nothing in the terms of ss 359A or 359AA that requires the relevant information to be adverse in its terms.

Minister's submissions

23 The Minister submitted that the Tribunal did not fail to comply with its obligations under ss 359A and 359AA of the Migration Act. The movements record was not 'information' for the purposes of s 359A, because it did not contain information that 'in its terms' constituted a rejection, denial or undermining of the applicant's claims to be entitled to a partner visa. The Minister submitted that information 'does not encompass the Tribunal's subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the Tribunal in weighing up the evidence by reference to those gaps, etc': *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549; [2004] FCAFC 123 at [24].

24 The Minister submitted that, by itself, the sponsor's movements record was not dispositive to the applicant's claim that there were compelling reasons to waive the Schedule 3 criteria, and was, in its terms, neutral information.

25 In oral submissions, Counsel for the Minister referred the Court to the case of *SZGIY* in support of his submissions. In that case, the Tribunal relied on the visa applicant's delay in making a protection visa application to find against him. Counsel for the Minister referred the Court to the Full Court's finding that the date of arrival of the visa applicant in *SZGIY* was neutral information which did not engage the obligations in s 424A of the Migration Act (which are equivalent to those in s 359A). Counsel for the Minister submitted that the same reasoning should be applied in the present case.

Resolution

26 Subsection 359A(1) of the Migration Act provides:

Subject to subsections (2) and (3), the Tribunal must:

- (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that it is under review; and
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
- (c) invite the applicant to comment on or respond to it.

27 Subsection 359A(3) and s 359AA allow the Tribunal to alternatively orally give to the applicant clear particulars of information that would be the reason or a part of the reason for affirming the decision under review where the applicant attends a hearing under s 360 of the Migration Act.

28 There is no real dispute between the parties that the Tribunal obtained the sponsor's movements record after the hearing and did not invite the applicant to comment on the precise information set out in the movements record.

29 The Tribunal relied on the sponsor's movements record in finding that there were not compelling reasons for not applying the Schedule 3 criteria. The Tribunal said at [35] (emphasis added):

It was submitted that the applicant is reliant on the sponsor for support including emotional support particularly at the time of her accident which was a "threat to her health and safety and a concern for the sponsor". The Tribunal accepts this may have been so. **However, from movement records, and as set out above, the Tribunal notes the sponsor was out of Australia from 18 February 2015 only returning in August that year. In this circumstance whilst accepting there may have been some emotional support the Tribunal places less weight on the claim and finds any need of the applicant to rely upon the sponsor for support is not so compelling as to provide a basis for the waiver of schedule 3 criteria.**

30 The resolution of ground 1 largely turns on the meaning of the word 'information' for the purposes of ss 359A(1) and 359AA(1), and whether the obligation on the Tribunal extends only to information which is, in its terms, adverse, or whether it also extends to information which is neutral in its terms, but relied on by the Tribunal in a way that is adverse to an applicant's claims.

31 The Minister relies primarily on two cases to refute the applicant’s first ground of application and to support his submission that the sponsor’s movements record is not ‘information’ for the purposes of s 359A. The first of these cases is *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1; [2007] HCA 26 (*SZBYR*), in which the High Court considered the operation of s 424A of the Migration Act, which is the Part 7 equivalent of s 359A. The majority (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) said at [17] (emphasis added):

Secondly, the appellants assumed, but did not demonstrate, that the statutory declaration “would be the reason, or a part of the reason, for affirming the decision that is under review”. The statutory criterion does not, for example, turn on “the reasoning process of the tribunal”, or “the tribunal’s published reasons”. The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance — and independently — of the tribunal’s particular reasoning on the facts of the case. Here, the appropriate criterion was to be found in s 36(1) of the Act, being the provision under which the appellants sought their protection visa. The “reason, or a part of the reason, for affirming the decision that is under review” was therefore, that the appellants were not persons to whom Australia owed protection obligations under the Convention. When viewed in that light, **it is difficult to see why the relevant passages in the appellants’ statutory declaration would itself be “information that the tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review”. Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellants’ claims to be persons to whom Australia owed protection obligations.** Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming, the decision under review.

32 The second case relied on by the Minister is *SZGIY*, in which the Full Court of the Federal Court (Dowsett, Bennett and Edmonds JJ) considered whether the visa applicant’s date of arrival in Australia, which, in conjunction with the date of her visa application, had caused the Tribunal to doubt the genuineness of the applicant’s protection claims, was information that was required to be put to the applicant under s 424A. The Court said at [23]:

The appellant’s counsel accepted that the date of the appellant’s arrival in Australia was, itself, neutral. As such, it would not engage s 424A(1). It did not, in terms, reject, deny or undermine the appellant’s claim to be a person to whom Australia owed protection obligations. See *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [17]. It was therefore not information which could be the reason, or part of the reason, for affirming the delegate’s decision.

33 At [25] the Court found that the date of the visa application was also not information for the purposes of s 424A(1) because it was ‘neutral’.

34 At [27], the Court considered that the ‘deductions’ made from two neutral facts did not comprise information for the purposes of s 424A(1). The Court said:

The proposition that an inference or deduction based upon two facts can constitute “information” for the purposes of s 424A(1) does not fit easily into the structure of s 424A as a whole. In *SZBYR* the High Court stressed the distinction between the concept of “information” and the reasoning process leading to affirmation of the decision under review. That process must necessarily reflect the prescribed criteria which were relevant in making the original decision. In the present case, the primary question was whether the appellant was a person to whom Australia owed protection obligations. The dates, taken in isolation, said nothing about whether the appellant was such a person. Taken together, they demonstrated that she had made the visa application almost seventeen months after her arrival in Australia. That fact, which was the product of arithmetical calculation, taken in isolation, also said nothing about Australia’s obligations to her. However it was open to the Tribunal to consider the appellant’s conduct and whether it was consistent with her claims. Unexplained delay in applying for a protection visa might well be inconsistent with her claim to fear persecution in China. The drawing of inferences and the assessment of their relevance are more appropriately described as part of the reasoning process than as information for the purposes of s 424A(1).

35 In the present matter, I accept the Minister’s submission that the information in the movements records of the applicant and the sponsor is information that is neutral in its terms, and that the Tribunal has not breached ss 359A or 359AA of the Migration Act in relation to that information. The information in the movements records is not a rejection, denial or undermining of the applicant’s claims that there were compelling reasons not to apply the Schedule 3 criteria, and therefore is not ‘information’ which attracts the obligation in ss 359A and 359AA.

36 The Tribunal drew inferences from the information in the movements records in relation to the level of emotional support that the applicant derived from the sponsor, and based on these inferences, found that the emotional support that the applicant derives from the sponsor did not amount to a compelling reason not to apply the Schedule 3 criteria. That is part of the Tribunal’s thoughts and reasoning process and did not need to be put to the applicant for comment.

37 I acknowledge the submission advanced by Counsel for the applicant that nothing in the terms of ss 359A and 359AA requires the information to which those sections apply to be adverse. However, I am bound by the judgments in *SZBYR* and *SZGIY* and, applying those judgments, find that the Tribunal in the present matter was not required to follow the procedures in ss 359A or 359AA in relation to the neutral information in the movements records, or its thought processes in relation to how it proposed to rely on that information.

38 Ground 1 is not established.

GROUND 2

Applicant's submissions

39 The applicant submitted that the Tribunal wrongly fettered its approach to 'compelling circumstances' by construing the provision as if the mere existence of a genuine relationship could not in itself be a compelling reason for not applying the Schedule 3 criteria and, by so doing, allowing policy guidance to unduly fetter the Tribunal's approach to cl 820.211(2)(d) (ii). Rather, the Tribunal was required to 'consider' whether compelling reasons existed by engaging in an 'active intellectual process' in which the prescribed circumstance 'receives [the Tribunal's] genuine consideration': *MZYPZ v Minister for Immigration and Citizenship* (2012) 127 ALD 510; [2012] FCA 478 at [19].

40 The applicant relied on *Singh v Minister for Immigration and Border Protection* (2017) 325 FLR 275; [2017] FCCA 2461 in which the Tribunal was found to have incorrectly construed Public Interest Criteria 4020(4)(b) by excluding from the notion of compassionate and compelling circumstances 'the emotional bonds and emotional support each party to such relationship provided each other because the Tribunal regarded these matters to be the hallmarks or usual incidents of a genuine partner relationship': at [56].

41 The applicant submitted that, while in some cases it would be open on the evidence for the Tribunal to find that the mere existence of a genuine relationship is not enough to be compelling, it was erroneous of the Tribunal to proceed on the basis that the mere existence of a genuine relationship could never be a reason to exercise the discretion. In oral submissions, Counsel for the applicant identified [24] of the Tribunal reasons as demonstrating this error. In that paragraph, the Tribunal said:

As explained at the hearing, the mere existence of a genuine relationship is not of itself a compelling reason not to apply the Schedule 3 requirements.

42 Counsel for the applicant submitted that this sentence shows the Tribunal believed that a genuine relationship can never be a compelling reason to not apply the Schedule 3 criteria. There is nothing in the Migration Act or the Regulations that defines what amounts to a compelling reason or which says that a genuine spousal relationship can never amount to a compelling reason.

43 Counsel for the applicant reiterated that it would be acceptable for a Tribunal to find that, after looking at the evidence in a particular case, the fact that a person is in a genuine relationship is not a compelling reason to waive the Schedule 3 criteria, but it is not acceptable for the Tribunal to treat the existence of a genuine relationship as something that can never be a compelling reason.

Minister's submissions

44 The Minister submitted that the Tribunal's reasons when read fairly do not reflect an unlawful approach to or fettering of its assessment. The Minister submitted that the Tribunal's lack of satisfaction at [24] that 'the claimed genuine relationship in this application' constituted a compelling reason shows that the Tribunal considered the applicant's case individually and found that, in this case, the mere existence of a genuine relationship did not amount to a compelling reason. This finding was open to the Tribunal, particularly in the context of its later finding at [36] that the applicant's evidence was exaggerated and the relationship bore hallmarks of contrivance.

45 In oral submissions, Counsel for the Minister agreed that it would be an error for the Tribunal to say, as a legal statement, that the mere existence of a genuine relationship is not of itself a compelling reason. However, Counsel for the Minister submitted that even if the reasoning at [24] were interpreted in that way, it would not be material because the Tribunal clearly considered the relationship put to it and did not necessarily agree that there was a genuine relationship, although it did not ultimately make a finding on that point.

Resolution

46 Clause 820.211(2)(d)(ii) provides:

(2) An applicant meets the requirements of this subclause if:

...

(d) in the case of an applicant who is not the holder of a substantive visa
– either:

...

(ii) the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.

47 As Counsel for the applicant submitted, there is no definition of ‘compelling reasons’ in the Migration Act or the Regulations and there is nothing in the relevant legislation to indicate that the genuineness of the relationship can never be a compelling reason.

48 The proposition that the genuineness of the relationship can be relevant to the consideration of whether there are compelling reasons not to apply the Schedule 3 criteria is supported by the judgment of Katzmann J in *Qin v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 490, a case to which both Counsel referred in their oral submissions. In that case, her Honour said at [53]-[54]:

53. It is by no means obvious that the genuineness of the marriage is a matter that must be taken into account in determining whether there are compelling reasons for not applying the Sch 3 criteria. Rather, cl 820.211 rests on the assumption that the marriage is genuine. After all, for the purposes of the Migration Act, spouses are defined as persons in a genuine and continuing relationship with each other: Migration Act, s 5F. As Allsop CJ observed in *Choi v Minister for Immigration and Border Protection* [2018] FCA 291 at [34], “[f]rom a practical point of view, since the existence of a genuine relationship is already a requirement for a partner visa, one must show additional impetus for the waiver of the relevant Sch 3 criteria”.

54. That is not to say that the Tribunal was bound to ignore the nature of the relationship. It is not an irrelevant consideration in the *Peko-Wallsend* [(1986) 162 CLR 24; [1986] HCA 40] sense. A decision-maker, acting reasonably, could well take it into account and give it weight. Had the Tribunal considered that the marriage was not genuine, for example, that might well have been a compelling reason to refuse to waive compliance with the Sch 3 criteria. The fact that the Tribunal in the present case did not consider the genuineness of the marriage to be probative does not bespeak jurisdictional error.

49 In the present matter, both parties appear to accept that:

- (a) it would be wrong for the Tribunal to proceed on the basis that the genuineness of a relationship can never amount to a compelling reason to not apply the Schedule 3 criteria; and
- (b) it is acceptable for the Tribunal to consider the particular circumstances of the relationship in the matter before it, and conclude that, in the particular matter, the genuineness of the relationship does not amount to a compelling reason.

50 The resolution of this ground therefore turns on a characterisation of the Tribunal’s reasons.

51 The Tribunal recorded at [19] of its reasons the matters that the applicant indicated to the Department that she wished to be taken into account in assessing whether there were

compelling reasons not to apply the Schedule 3 criteria. One of these was that ‘she and her partner are in a genuine and continuing relationship’.

52 The Tribunal then proceeded to consider whether there were compelling reasons not to apply the Schedule 3 criteria under four subheadings: ‘Genuine relationship’, ‘Length of relationship’, ‘The applicant’s medical evidence’ and ‘Emotional support’.

53 Under the heading ‘Genuine relationship’, the Tribunal said:

23. The applicant claims her relationship with her sponsor is genuine and continuing.

24. As explained at the hearing, the mere existence of a genuine relationship is not of itself a compelling reason not to apply the Schedule 3 requirements. The Tribunal is not satisfied that the claimed genuine relationship in this application is a sufficient reason not to apply the Schedule 3 criteria.

54 While the first sentence of [24] is quite general in nature, the second sentence in [24] expresses the Tribunal’s conclusion about the particular relationship in the application before it. The Tribunal reasons at [24] when read fairly do not, in my view, reflect an understanding that the genuineness of a relationship can never be a compelling reason. Rather, they reflect a finding that the claimed genuine relationship in the present matter did not amount to a compelling reason for not applying the Schedule 3 criteria. Read in isolation, the Tribunal reasons at [24] say little about the reasons for the Tribunal’s finding that the claimed genuineness of the relationship between the applicant and the sponsor is not a compelling reason. However, the Tribunal reasons must be read as a whole, and the findings made by the Tribunal in other paragraphs may inform the finding at [24]. This includes the finding at [36], referred to by Counsel for the Minister, where the Tribunal said:

The Tribunal formed the view that the applicant’s evidence in this application was exaggerated for her own purposes and that the application bears hallmarks of a claimed relationship for the purposes of an immigration pathway only.

55 When the Tribunal reasons are read as a whole, I am satisfied that the Tribunal did not approach the matter on the basis that the genuineness of the relationship can never be a compelling reason not to apply the Schedule 3 criteria. Rather, the Tribunal considered the evidence relating to and circumstances of the applicant’s relationship with the sponsor and was not satisfied that the claimed genuineness of the relationship in the present matter amounted to a compelling reason not to apply the Schedule 3 criteria. This line of reasoning was open to the Tribunal.

56 Ground 2 is not established.

GROUND 3

Applicant's submissions

57 Ground 3 arises from the same factual basis as ground 1. The applicant submitted that the Tribunal breached s 360 of the Migration Act because rather than inviting the applicant to attend a hearing to give evidence and present arguments relating to the issues arising in relation to the decision under review, it obtained the sponsor's movements record after the hearing and took that evidence into account in affirming the decision without giving the applicant an opportunity to be heard about the evidence of the sponsor's travel and the couple's time apart in 2015. The applicant submitted that in the absence of an opportunity to be heard in relation to that evidence, the invitation to attend a hearing to give evidence and present arguments was merely an empty shell or hollow gesture.

58 In oral submissions, Counsel for the applicant referred the Court to the summary of principles summarised by Judge Kelly in *Malhi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1080 (*Malhi*) at [28]-[33]. Counsel for the applicant acknowledged that the Tribunal is not required to run a commentary at the hearing of what it might decide, but submitted that the sponsor's movements record was important to the Tribunal decision and should have been provided to the applicant before or during the hearing, or discussed with the applicant.

59 Counsel for the applicant also submitted that there was a new issue raised in relation to the movements records. She submitted that the critical period that the Tribunal appears to focus on is the period in June 2015 when the applicant's previous visa ceased, to November 2015, when the partner visa application was lodged. The delegate's decision did not address any lack of emotional support as a result of the sponsor not being in Australia when the applicant had her medical issues. Counsel for the applicant submitted that the Tribunal's lack of satisfaction about the emotional support in 2015 when the applicant had health needs was critically important to the Tribunal and was a new issue.

Minister's submissions

60 The Minister submitted that the Tribunal did not breach its obligations under s 360 of the Migration Act. The Tribunal was obliged to inform the applicant of the issue, but not of each fact relating to the issue, and a distinction can be drawn between an issue and factual matters relating to a general issue: *SZJUB v Minister for Immigration and Citizenship* [2007] FCA 1486 (*SZJUB*) at [25]; *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1;

[2008] FCAFC 138 at [103]. The Minister submitted that the movements record was merely an item of evidence that related to a factual issue advanced by the applicant as a compelling reason and did not constitute an ‘issue’ that gave rise to obligations under s 360 of the Migration Act. The applicant had been put on notice in the hearing invitation of the issue of whether there were compelling reasons to not apply the Schedule 3 criteria.

61 The Minister also submitted that the sponsor’s travel to and from Australia and Vietnam was discussed with the applicant at length at the Tribunal hearing when the Tribunal discussed the applicant’s movements record. The applicant had therefore been afforded an opportunity to provide evidence about the emotional support that she received from the sponsor and how it was provided when they were apart.

62 Counsel for the Minister submitted at the hearing that what the Tribunal said at [35] does not raise any new issue. The applicant herself raised the issue of emotional support in her submissions to the Tribunal and this was discussed at the hearing. To the extent that the sponsor’s movements record might be seen as new information, that was information going to an extant issue, namely, the emotional support provided, and that did not require any further hearing.

Resolution

63 Section 360 of the Migration Act requires the Tribunal to invite an applicant to a hearing to give evidence and present arguments in relation to the issues relevant to the review. The section provides:

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
- (2) Subsection (1) does not apply if:
 - (a) the Tribunal considers that it should decide the review in the applicant’s favour on the basis of the material before it; or
 - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
 - (c) subsection 359C(1) or (2) applies to the applicant.
- (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

64 In *Malhi*, Judge Kelly considered the role of s 360 within the broader framework of Division 5 of Part 5 of the Migration Act. At [32], his Honour said:

As the text of s 360 makes clear, in conducting a review of a *Part 5-reviewable decision*, one aspect of the natural justice hearing rule which governs the manner of merits review is that the Tribunal must invite the applicant to a hearing. The purpose of the invitation is stated explicitly in the section; that is, the applicant is to be afforded an invitation to give evidence and present arguments relating to the issues arising in relation to the primary decision. Contextually, the content of the obligation to invite an applicant to a hearing is informed by par 360(2)(a) inasmuch as the obligation is not engaged where the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it: *SZBEL [v Minister for Immigration and Multicultural and Indigenous Affairs]* (2006) 228 CLR 152; [2006] HCA 63, [27]. In all other circumstances, the obligation is so engaged. This indicates that the premise upon which a hearing of merits review of a *Part 5-reviewable decision* proceeds is that the Tribunal has formed a preliminary view, on the basis of the material before it, which is not favourable to the application for review. I agree in the submission of counsel for the applicant that the hearing is one in which the applicant is to be afforded a meaningful opportunity to address doubts that may be held by the Tribunal and to assuage concerns in relation to the merits of the application for a visa. On the principles stated above, a Tribunal is under no obligation to inform an applicant of subjective doubts, thought processes or determinations, including as to conclusions arrived at in weighing up the evidence. Those considerations serve to inform the importance that the invitation to give evidence and present arguments (informed by the Tribunal's preliminary view that it does not consider the application should be granted on the material before it), is directly related to the discharge of the Tribunal's core function of reviewing a decision on its merits review. In turn, this underscores the imperative importance of the invitation. It represents *the opportunity* given to an applicant to participate in a meaningful way at a hearing on the merits.

- 65 The issue before the Tribunal in this matter was whether there were compelling reasons for not applying the Schedule 3 criteria. As identified by the Minister in his written submissions, the Tribunal put the applicant on notice of this issue when it sent the hearing invitation.
- 66 The applicant advanced a number of issues relevant to whether there were compelling reasons. One such issue was the emotional support she received from the sponsor, particularly around the time she had an accident in 2015. This issue was addressed by the applicant's representative in written submissions provided to the Tribunal and the applicant had an opportunity to give evidence in relation to this issue at the hearing before the Tribunal. I accept the Minister's submissions that the details in the sponsor's movements record were facts relevant to this issue, and the Tribunal was not obliged to inform the applicant of these facts: *SZJUB* at [25].
- 67 The Tribunal was not obliged to inform the applicant of its thought processes in relation to the claimed compelling reasons. The failure to put to the applicant the sponsor's movements record and to invite her to comment on that information did not make the invitation to attend a hearing a hollow gesture or a meaningless opportunity. The Tribunal in the present case did not breach s 360 of the Migration Act.

68 Ground 3 is not established.

CONCLUSION

69 I have found that the applicant has not established jurisdictional error in the Tribunal decision. The application to this Court must therefore be dismissed.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Ladhams.

Associate:

Dated: 21 November 2022